Aviation Development Corp (M) Sdn Bhd v Yayasan Selangor

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 03-3–10 OF 2020 (W)
ZAWAWI SALLEH, ZABARIAH YUSOF AND HASNAH HASHIM FCJJ
7 MARCH 2022

Civil Procedure — Damages — Assessment of damages — Appeal against decision of Court Appeal on assessment of damages — High Court decided in liability judgment that respondent and appellant had breached joint venture agreement ('JVA') — High Court ordered assessment of damages to be determined by deputy registrar pursuant to cl 4.7 of JVA — Deputy registrar had assessed damages — High Court reduced amount of damages to be paid to appellant as ordered by deputy registrar — Court of Appeal reversed High Court's decision on assessment of damages and held that appellant failed to prove its loss — Whether Court of Appeal acted contrary to liability judgment — Whether question raised by appellant was novel and involved question of law of general principle not previously decided by Federal Court — Whether question in relation to rule of 'a party should not benefit from its breach' was secondary to issue that appellant failed to prove its loss — Whether Court of Appeal had imposed higher burden of proof on appellant to prove its loss — Courts of Judicature Act 1964 s 96(a)

The respondent and the appellant had entered into a joint venture agreement ('the JVA') for the development of an airport on the respondent's land. Dispute arose between the parties which led to a High Court's judgment ('the liability judgment') holding that both the respondent and the appellant had breached the condition precedents of the JVA. In the liability judgment, the High Court had directed, inter alia, that an assessment of the other sums to be repaid by the respondent to the appellant pursuant to cl 4.7 of the JVA be determined and assessed by the registrar in accordance with the said clause. At the end of the hearing for the assessment of damages, the deputy registrar had assessed the damages at RM24,872,021.10 but the amount was reduced to RM24,202,141 by the High Court judge. On appeal, the Court of Appeal ('the COA') had reversed the decision of the High Court and held that the appellant was not entitled to the compensation and that the appellant had failed to prove that the cash payments it had made for costs and expenses under cl 4.7 of the JVA were indeed paid out to and received by its consultants/contractors. The Federal Court granted leave to the appellant to appeal premised upon the following questions of law: (a) what was the role of the court in assessing damages or any other sums ordered pursuant to the liability judgment and whether it may act contrary to the liability judgment ('question 1'); (b) whether the 'no party should benefit from its own breach' rule could be raised at the assessment proceeding in light of the case of *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* (2005) 12 BPR 23 ('question 2'); (c) whether the 'no party should benefit

from its own breach' rule was applicable when both parties had been held to be equally blameworthy for the non-performance of the contract ('question 3'); (d) whether parties could exclude or modify the 'no party should benefit from its own breach' rule in light of the English Court of Appeal case of *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 ('question 4'); (e) whether knowledge of the breach and acquiescence thereof disentitled a litigant from raising the 'no party should benefit from its own breach' rule (question 5'); (f) what was the effect of the Federal Court decision in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141 where a party was recovering damages or any other sums ordered pursuant to a judgment on liability for works done without relevant approval under a lawful contract ('question 6'); and (g) what was the standard of proof and/or the level of scrutiny to be placed on cash transactions as opposed to bank transactions when assessing damages or any other sums ordered pursuant to a judgment on liability in light of the Court of Appeal's decision of *Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals* [2017] 3 MLJ 728 ('Lee Chee Keong') and s 21 of the Currency Act 2020 ('question 7') — in respect of this question, the appellant argued that the COA had placed undue emphasis on the fact that cash payments for large sums had been made and failed to give due consideration to the evidence placed before the court and had in the course of making its decision had placed a higher burden of proof on the appellant.

Held, dismissing the appeal with agreed costs of RM50,000 subject to allocator and affirming the decision of the COA:

(1) Question 1 was misconceived. There was no misdirection by the COA and neither did it misapprehended the legal principles applicable to assessment of damages and appellate intervention. To determine the losses incurred by the appellant within the scope of cl 4.7 of the JVA was definitely not revisiting the liability issue. The question was premised on an erroneous presumption that the COA was acting contrary to the liability judgment. Further, question 1 was not novel and did not involve a question of law of general principle not previously decided for the first time by the Federal Court (the first limb of s 96(a) of the Courts of Judicature Act 1964). It was trite principle of law that a court must assess damages according to the direction by the court to assess except that in the present case, it was confined to costs and expenses which were legitimately and properly incurred for the purposes of the development pursuant to cl 4.7 of the JVA. The question framed therefore did not reflect the facts of the present case. The context of the liability judgment was facts sensitive. Hence, the court declined to answer question 1 (see paras 52–53 & 80).

(2) The court refused to answer question 2 to question 6 because the rule of 'a party should not benefit from its breach' was secondary to the issue that

the appellant failed to prove its loss. The principle of 'a party should not benefit from its breach' raised in question 2 to question 6 were never raised nor argued in the High Court and the Court of Appeal. In any event, the principle of 'a party should not benefit from its breach' was not the basis of the decision of the COA when allowing the appeal of the respondent (see paras 55, 60–65, 71–72 & 80).

(3) The appellant's contention in respect of question 7 was misconceived. The COA emphasised in its judgment that 'there is nothing wrong in making payments in cash'. It qualified such statement with specific reference to the present case that serious questions should have been asked when the total paid in cash was purportedly RM17m and the lack of evidence as to the appellant's source of monies and the ability of the appellant to pay such amounts was highly incredible. Premised on the inadequacy of evidence to substantiate the appellant's alleged loss which was further heightened by the lack of documentary evidence and the uncorroborated testimony of the appellant's other witnesses, the COA had rightly concluded that the High Court was plainly wrong in evaluating the evidence before it when it failed to judicially appreciate the same. There was no higher standard of proof imposed on the appellant in proving its losses. The standard of proof had always been on a balance of probability. In addition, the reliance by the appellant on *Lee Chee Keong* was misplaced as the facts in the present case and *Lee Chee Keong* were poles apart. Further, the Currency Act 2020 was not applicable to the issues in our case. In any event, answering question 7 would not change the outcome of the appeal by the appellant (see paras 74 & 76–80).

[Bahasa Malaysia summary

Responden dan perayu telah memeterai perjanjian usaha sama ('JVA') untuk pembangunan lapangan terbang di atas tanah responden. Pertikaian timbul antara pihak-pihak yang membawa kepada penghakiman Mahkamah Tinggi ('penghakiman liabiliti') yang memutuskan bahawa kedua-dua responden dan perayu telah melanggar syarat duluan JVA tersebut. Dalam penghakiman liabiliti, Mahkamah Tinggi telah mengarahkan, antara lain, bahawa taksiran jumlah lain yang perlu dibayar balik oleh responden kepada perayu menurut klausa 4.7 JVA tersebut ditentukan dan dinilai oleh pendaftar mengikut klausa tersebut. Pada akhir perbicaraan bagi taksiran ganti rugi, timbalan pendaftar telah menilai ganti rugi sebanyak RM24,872,021.10 tetapi jumlah tersebut dikurangkan kepada RM24,202,141 oleh hakim Mahkamah Tinggi. Semasa rayuan, Mahkamah Rayuan ('MR') telah mengubah keputusan Mahkamah Tinggi dan memutuskan bahawa perayu tidak berhak mendapat pampasan dan bahawa perayu telah gagal membuktikan bahawa bayaran tunai yang telah dibuatnya untuk kos dan perbelanjaan di bawah klausa 4.7 JVA tersebut sememangnya telah dibayar kepada dan diterima oleh perunding/kontraktornya. Mahkamah Persekutuan memberi kebenaran

kepada perayu untuk merayu berdasarkan persoalan-persoalan undang-undang berikut: (a) apakah peranan mahkamah dalam menilai ganti rugi atau apa-apa jumlah lain yang diperintahkan menurut penghakiman liabiliti dan sama ada ia boleh bertindak bertentangan dengan penghakiman liability tersebut ('soalan 1'); (b) sama ada peraturan 'no party should benefit from its own breach' boleh dibangkitkan pada prosiding penilaian berdasarkan kes *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* (2005) 12 BPR 23 ('soalan 2'); (c) sama ada peraturan 'no party should benefit from its own breach' adalah terpakai apabila kedua-dua pihak telah diputuskan sama-sama bersalah atas ketidaklaksanaan kontrak ('soalan 3'); (d) sama ada pihak boleh mengecualikan atau mengubah suai peraturan 'no party should benefit from its own breach' berdasarkan kes Mahkamah Rayuan Inggeris *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 ('soalan 4'); (e) sama ada pengetahuan tentang pelanggaran dan persetujuan ke atas pelanggaran tersebut menyebabkan litigan tidak berhak untuk membangkitkan 'no party should benefit from its own breach' ('soalan 5'); (f) apakah kesan keputusan Mahkamah Persekutuan dalam *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141 di mana suatu pihak ingin mendapatkan ganti rugi atau apa-apa jumlah lain yang diperintahkan menurut penghakiman ke atas liabiliti bagi kerja yang dilakukan tanpa kelulusan yang diperlukan di bawah kontrak yang sah ('soalan 6'); dan (g) apakah piawaian pembuktian dan/atau tahap penelitian yang perlu diletakkan pada urus niaga tunai berbanding dengan urus niaga bank apabila menilai ganti rugi atau apa-apa jumlah lain yang diperintahkan menurut penghakiman liabiliti berdasarkan keputusan Mahkamah Rayuan *Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals* [2017] 3 MLJ 728 ('Lee Chee Keong') dan s 21 Akta Mata Wang 2020 ('soalan 7') — berkenaan dengan soalan ini, perayu berhujah bahawa MR telah memberi penekanan yang tidak wajar pada hakikat bahawa pembayaran tunai untuk jumlah yang besar telah dibuat dan gagal untuk memberi pertimbangan yang sewajarnya kepada keterangan yang dikemukakan di hadapan mahkamah dan semasa membuat keputusannya telah meletakkan beban pembuktian yang lebih tinggi ke atas perayu.

Diputuskan, menolak rayuan dengan kos yang dipersetujui sebanyak RM50,000 tertakluk kepada alokator dan mengesahkan keputusan Mahkamah Rayuan:

(1) Soalan 1 adalah satu salah tanggap. Tiada salah arah oleh MR dan MR juga tidak tersalah faham ke atas prinsip undang-undang yang terpakai untuk penilaian ganti rugi dan campur tangan rayuan. Penentuan kerugian yang ditanggung oleh perayu dalam skop klausa 4.7 JVA tersebut tentunya tidak terjumlah kepada penelitian semula isu liabiliti. Soalan tersebut didasari atas anggapan yang salah bahawa MR bertindak bertentangan dengan penghakiman liabiliti. Selanjutnya, soalan 1

bukanlah sesuatu yang baru dan tidak melibatkan persoalan undang-undang prinsip am yang tidak pernah diputuskan buat kali pertama oleh Mahkamah Persekutuan (bahagian pertama s 96(a) Akta Mahkamah Kehakiman 1964). Adalah menjadi prinsip undang-undang yang mantap bahawa mahkamah perlu menilai ganti rugi mengikut arahan mahkamah untuk menilai kecuali dalam kes semasa, ia terhad kepada kos dan perbelanjaan yang sah dan wajar ditanggung untuk tujuan pembangunan tersebut menurut klausa 4.7 JVA. Oleh itu, soalan yang dirangka tidak menggambarkan fakta kes ini. Konteks penghakiman liabiliti tersebut adalah sensitif kepada fakta. Oleh itu, mahkamah enggan menjawab soalan 1 (lihat perenggan 52–53 & 80).

(2) Mahkamah enggan menjawab soalan 2 hingga soalan 6 kerana peraturan 'a party should not benefit from its breach' adalah isu sekunder kepada isu bahawa perayu gagal membuktikan kerugiannya. Prinsip 'a party should not benefit from its breach' yang dibangkitkan dalam soalan 2 hingga soalan 6 tidak pernah dibangkitkan atau dihujahkan di Mahkamah Tinggi dan Mahkamah Rayuan. Dalam apa jua keadaan, prinsip 'a party should not benefit from its breach' bukanlah asas kepada keputusan MR apabila membenarkan rayuan responden (lihat perenggan 55, 60–65, 71–72 & 80).

(3) Hujahan perayu berkenaan dengan soalan 7 adalah salah tanggap. Mahkamah Rayuan menegaskan dalam penghakimannya bahawa 'there is nothing wrong in making payments in cash'. Ia mengecualikan pernyataan sedemikian dengan merujuk khusus kepada kes semasa di mana soalan serius sepatutnya dibangkitkan apabila jumlah yang dibayar secara tunai adalah kononnya sebanyak RM17 juta dan kekurangan keterangan tentang sumber wang perayu dan keupayaan perayu untuk membayar jumlah tersebut adalah sangat sukar untuk dipercayai. Berdasarkan ketidakcukupan keterangan untuk mengesahkan dakwaan kerugian perayu yang diburukkan lagi dengan kekurangan keterangan dokumentari dan keterangan saksi-saksi perayu yang lain yang tidak disokong, MR telah membuat kesimpulan yang betul bahawa Mahkamah Tinggi secara jelas salah dalam menilai keterangan di hadapannya apabila ia gagal untuk mengambil kira perkara-perkara tersebut secara adil. Tiada piawaian pembuktian yang lebih tinggi dikenakan ke atas perayu dalam membuktikan kerugiannya. Piawaian pembuktian sentiasa berada pada imbangan kebarangkalian. Di samping itu, pergantungan oleh perayu kepada *Lee Chee Keong* adalah tersasar kerana fakta dalam kes ini dan *Lee Chee Keong* jauh berbeza. Selanjutnya, Akta Mata Wang 2020 tidak terpakai kepada isu dalam kes ini. Dalam apa keadaan sekali pun, menjawab soalan 7 tidak akan mengubah keputusan rayuan perayu (lihat perenggan 74 & 76–80).]

Cases referred to

BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd [2011] EWCA Civ 548, CA (refd)
Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, KBD (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals [2017] 3 MLJ 728, CA (distd)
Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141, FC (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)
Patel v Mirza [2016] UKSC 42, SC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, HC (refd)
Ruthol Pty Ltd v Tricon (Australia) Pty Ltd (2005) 12 BPR 23, SC (refd)
Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals [2021] 3 MLJ 914; [2021] 2 CLJ 318, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016)
Courts of Judicature Act 1964 s 96, 96(a)
Currency Act 2020 s 21
Income Tax Act 1967
Penal Code

Appeal from: Civil Appeal No W-02(NCvC)(W)-1402–07 of 2017 (Court of Appeal, Putrajaya)

Ambiga Sreenevasan (James Joshua a/l Paulraj, Lim Wei Jiet, Shireen Ann Selvaratnam and P Taneswaran with her) (Tanes, Khoo & Paulra) for the appellant.
Malik Imtiaz (Fahda Nur Ahmad Kamar, Chan Wei June, Wong Ming Yen and Amanina Yusrina Ahmad Kamal with him) (Fahda Nur & Yusmadi) for the respondent.

Zabariah Yusof FCJ:

[1] The appeal is against the decision of the Court of Appeal dated 12 July 2019 which reversed the decision of the learned High Court judge who had assessed damages due to the appellant at RM24,202,141 together with interest and costs.

[2] In this judgment, we will refer to the parties, as they appear in the High

A Court, namely the appellant as the defendant and the respondent as the plaintiff.

[3] The Federal Court granted leave to the defendant to appeal premised upon the following questions of law:

B

Question 1:

What is the role of the court in assessing damages or any other sums ordered
C pursuant to a judgment on liability (liability judgment), and whether it may act contrary to the liability judgment.

Question 2:

D

Whether the 'no party should benefit from its own breach' rule (which goes to liability) can be raised at the assessment proceeding in light of the case of *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* (2005) 12 BPR 23.

E *Question 3*:

Whether the 'no party should benefit from its own breach' rule is applicable when both parties have been held to be equally blameworthy for the non-performance of the contract.

F

Question 4:

Whether parties can exclude or modify the 'no party should benefit from its
G own breach' rule in light of the English Court of Appeal case of *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548.

Question 5:

H

Whether knowledge of the breach and acquiescence thereof disentitles a litigant from raising the 'no party should benefit from its own breach' rule.

I *Question 6*:

What is the effect of the Federal Court decision in *Liputan Simfoni Sdn Bhd v*

Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141 where a party is recovering damages or any other sums ordered pursuant to a judgment on liability for works done without relevant approval under a lawful contract.

Question 7:

What is the standard of proof and/or the level of scrutiny to be placed on cash transactions as opposed to bank transactions when assessing damages or any other sums ordered pursuant to a judgment on liability in light of the Court Appeal decision of *Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals* [2017] 3 MLJ 728 and the recently passed Currency Act 2020 (with reference to s 21 thereof).

[4] We have heard and considered the submissions of both parties, written and oral, and we reserved judgment. We are now ready to deliver our judgment on the appeal. The following are our reasons for our decision which is the unanimous decision of this court.

FACTUAL BACKGROUND

[5] Yayasan Selangor (the plaintiff) and Aviation Development Corp (M) Sdn Bhd (the defendant) had executed a Joint Venture Agreement dated 8 August 2007 (the JVA) to develop an airport on the plaintiff's land located at HS(D) 40850, PT 2924, Mukim Ulu Bernam, District of Ulu Selangor in the state of Selangor measuring approximately 88.9 hectares (the said land).

[6] Under the JVA, the said land was to be purchased by the defendant at the price of RM1,800,000.

[7] The defendant had already paid the sum of RM507,053 being the requisite deposit payment and squatters compensation, leaving a balance of RM1,292,947 which was to be paid to the plaintiff within the time stipulated in cl 3.2 of the JVA.

[8] Under the JVA, the plaintiff was obliged to obtain the consent to transfer the land to the defendant whilst the defendant was obliged to, inter alia, obtain the approved plans from the relevant authorities.

[9] In accordance with the said JVA, the plaintiff had given permission to the defendant to take possession of the said land on 16 January 2007. The defendant started the construction of the said airport, which, inter alia, includes the runway, infrastructure and the facilities needed to park, maintain

and operate a general aircraft.

[10] After the construction was completed, the defendant started commercial operations/business on the said airport.

[11] However, disputes arose between the plaintiff and the defendant regarding:

(a) the payment of the balance purchase price;

(b) the necessary approval from the relevant authorities (in particular the lay-out plans); and

(c) failure by the defendant to carry out the development diligently.

Liability proceedings before the High Court

[12] As a result, the plaintiff rescinded the JVA on 17 May 2010 which led the plaintiff filing a civil action in the High Court of Malaya in Kuala Lumpur vide Civil Suit No 22NCVC-791–07 of 2012 on 3 July 2012, in which the plaintiff had prayed for, inter alia, a declaratory order that the JVA was validly terminated by the plaintiff.

[13] On 21 November 2013, the learned High Court judge, Rosnaini Saub J, found that both the plaintiff and the defendant had breached the condition precedents of the JVA and ordered, inter alia, as follows:

> Bahawa Perjanjian Usahasama bertarikh 08.08.2007 ('Perjanjian Usahasama') telah sah dibatalkan (rescind) oleh Plaintif menurut Klausa 4.7 Perjanjian Usahasama tersebut; dan
>
> Bahawa Plaintif diperintahkan untuk membayar balik (refund) kepada Defendan jumlah sebanyak RM507,053.00 sebagai deposit dan pampasan setinggan (Squatters Compensation) serta pembayaran balik jumlah lain *sepertimana diperuntukkan di bawah Klausa 4.7 Perjanjian Usahasama*, yang akan ditentukan dan ditaksirkan oleh Pendaftar. (Emphasis included.)
>
> ('the liability judgment').

Appeal to the Court of Appeal on the liability judgment

[14] Aggrieved, the defendant appealed to the Court of Appeal vide Civil Appeal No W-02(NCVC)(W)-2648–12 of 2013, which was accordingly dismissed. Application for leave to appeal to the Federal Court was also dismissed. There was no cross-appeal filed by the plaintiff against the liability judgment of the learned High Court judge.

Assessment of damages before the deputy registrar in the High Court

[15] Hence, pursuant to the liability judgment of Rosnaini Saub J, the matter came before the Deputy Registrar to determine the cost that needed to be refunded by the plaintiff to the defendant in accordance with cl 4.7 of the JVA. For ease of reference, cl 4.7 JVA provides as follows:

> Upon occurrence of any of those events set out in Clause 4.6 herein, either party shall be entitled by notice in writing to the other Party, to rescind this Agreement, and in such an event ADC shall be entitled to terminate this Agreement and YS shall refund the Pre-Development Operational Costs (which includes the Deposit and the Squatters Compensation), all other monies paid to YS or any other parties and all costs and expenses which have been made by ADC in relation to the Development and thereafter, this Agreement shall cease to have any effect and neither Party shall have any claim against each other on any matters arising from or relating to this Agreement save and except for any antecedent breach and this Clause 4.7.

(NB: ADC refers to the defendant, and YS refers to the plaintiff)

[16] After a full trial before the deputy registrar of the High Court of Kuala Lumpur, the deputy registrar ordered that the pre-development operational costs to be paid by the plaintiff to the defendant in accordance with cl 4.7 of the JVA was *RM24,872,021.10* together with interests and cost of RM10,000.

Appeal to the judge in chambers on decision of the deputy registrar on assessment of damages

[17] The plaintiff filed an appeal to the judge in chambers in the High Court of Kuala Lumpur and on 14 July 2017 the learned Wan Ahmad Farid bin Wan Salleh J, on 14 July 2017 allowed the plaintiff's appeal in part and reduced the amount of the cost and the expenses that needed to be paid by the plaintiff to the defendant to *RM24,202,141* premised on the following reasons:

(a) on the claim made under cost of utilities, the court found it difficult to relate cl 4.7 of the JVA with the payments of utilities and even the assessment costs due to Majlis Daerah Hulu Selangor. The findings of the learned deputy registrar is therefore reversed and so hold accordingly; and

(b) the effect of reading together cl 4.7 and the meaning of 'Development' in cl 1.1 leads the court to conclude that these are the type of payments that the defendant has to pay anyway. Neither cl 4.7 nor cl 1.1 refers to utility bills or any assessment by the Majlis Daerah Hulu Selangor in the name of the defendant.

Appeal to the Court of Appeal against the decision of the High Court judge on the assessment of damages

[18] The plaintiff thereafter filed an appeal to the Court of Appeal on 18 July 2017 against the order of the High Court which ordered the plaintiff to pay the sum of RM24,202,141 to the defendant.

[19] The defendant also filed a cross-appeal against the decision of Dato' Wan Ahmad Farid bin Wan Salleh J that had reduced the cost to be refunded from the plaintiff to the defendant

Proceedings at the Court of Appeal

[20] The Court of Appeal on 12 July 2019 allowed the whole of the plaintiff's appeal and dismissed the cross-appeal of the defendant, with costs of RM30,000. The Court of Appeal held as follows:

(a) the defendant was not entitled to compensation on the following grounds:

(i) the defendant had commenced commercial activities on the said land without obtaining the necessary approvals from the relevant authorities as agreed in cll 6.3.1 and 6.3.2. in the JVA;

(ii) the defendant had failed to fulfill the conditions precedent set out in cll 4.1.2 and 4.1.4 of the JVA, which is to obtain the necessary approvals for the lay-out and building plans from the relevant authorities for purposes of executing the JVA. In other words, the defendant's entitlement to any development costs had to be for costs legitimately and properly incurred for the purposes of the JVA; and

(iii) as such by claiming the loss for these activities, the defendant was seeking to take advantage of its own wrong.

(b) the defendant had failed to prove that the cash payments it had made for costs and expenses under cl 4.7 of the JVA were indeed paid out to, and received by its consultants/contractors premised on the following reasons:

(i) there is no satisfactory evidence of cash payments being made to the consultants/contractors — in particular, there is no documentary evidence of such transactions in bank accounts;

(ii) there were no bank accounts and statement of accounts which were produced to show the source of the defendant's funds; and

(iii) the value of the improvement to the said land was only RM70,000 as testified by the registered valuer, hence alarm bells should have been

ringing when a claim in excess of RM24m was made for the costs and expenses incurred.

SUBMISSIONS BY THE DEFENDANT

[21] It was submitted that the effect of the liability judgment is that the defendant is entitled to be refunded all the sums paid pursuant to cl 4.7 of the JVA. As the liability judgment is a final judgment and binding on all parties, there is no question of the defendant not entitled to compensation as decided by the Court of Appeal. The Court of Appeal has gone into grave error when it held contrary to the liability judgment and this is not permitted under the law.

[22] There was full knowledge of the fact that the defendant was in breach of cl 4.1.2 and 4.1.4 of the JVA when the liability judgment was issued. The liability judgment had invoked cl 4.7 of the JVA, which arises from a failure to obtain the condition precedent, which was the approval from the relevant authorities.

[23] Clause 4.7 also envisages the recovery of costs and expenses incurred in the event no approval is obtained. The clause was not limited to recovery of costs and expenses legitimately incurred.

[24] The role of the assessing court was just to compute the amount to be refunded under cl 4.7 as stipulated in the liability judgment.

[25] The Court of Appeal went into further error when it applied the 'no party should benefit from its own breach' rule, given that the appeal was on the assessment of the amount to be refunded to the defendant. Liability is no longer an issue at that stage, as the liability judgment had found that both parties are in breach of the JVA. Hence, to apply the 'no party should benefit from its own breach' rule against the defendant only runs contrary to the liability judgment.

[26] The defendant submitted that it is trite that the 'no party should benefit from its own breach' rule is not applicable in the face of express provisions to the contrary in the JVA permitting a 'benefit' following a breach. In this case, the JVA under cl 4.7 explicitly envisaged the plaintiff to refund the defendant in circumstances where there is a breach of cl 4.1. This clearly exclude the rule of 'no party should benefit from its own breach'.

[27] In addition, the rule is inapplicable as the plaintiff had acquiesced to and/or had knowledge of the undertaking of the work without approval.

[28] The Court of Appeal held that the defendant was not entitled to

compensation under cl 4.7 as the defendant is seeking to recover costs and expenses that were not 'legitimately and properly incurred for the purposes of the JVA'. On this issue, it was submitted by the defendant that, firstly, nowhere did the learned High Court judge make any finding that the works on the said land were illegal. The JVA itself allowed work to be carried out upon obtaining vacant possession. At best, the failure to obtain the relevant approval was a breach of the JVA for which the defendant was penalised upon the termination of the same. Secondly, even if a party engages in an unlawful activity, it does not ipso facto deny the recovery for losses suffered. It was further submitted by the defendant that common law has adopted a more nuanced and proportionate approach based on the decision of the Supreme Court of UK in *Patel v Mirza* [2016] UKSC 42 which was accepted by the Federal Court in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141 which the Court of Appeal failed to consider.

[29] On the issue of the cash payments transactions made by the defendants, it was argued that it is not necessary to effect payments through a bank, when the payment could be made through cash. Hence, the failure by the defendant to produce bank statements is not and should not be determinative of whether the transactions in fact took place. Oral and documentary proof had been adduced to establish that cash payments were paid and received which was disregarded by the Court of Appeal. The deputy registrar who heard the oral testimony did not impugn the testimony of the witnesses of the defendant. There is also no dispute that significant works were undertaken, sufficient for the defendant to obtain permission from the Department of Civil Aviation to register its aerodrome for operation.

[30] It was further argued before us that the Court of Appeal failed to consider the absence of evidence from the plaintiff to tip the scale in its favour, save and except to produce a land valuer who assessed the value of improvement to the said land at RM70,000. This, according to the defendant, as being irrelevant to the value and the costs and expenses actually incurred by the defendant for consultancy to build an airpark and infrastructures built by its contractors.

[31] The defendant posited that the Court of Appeal was so distracted by the large amount of cash payments made in this case that it failed to give due regard to the relevant evidence and in the process placed an unduly high standard of proof on the defendant to substantiate the expenses that it had incurred in the development of the land. The defendant urged this court to answer the questions posed in favour of the defendant and to allow the appeal herein and uphold the decision of the learned High Court judge.

SUBMISSIONS BY THE PLAINTIFF

[32] The plaintiff submits that this court should decline to answer the questions as they are either academic, settled law, not raised in the court below or that it is prefaced upon the wrong factual matric of the case.

[33] In addressing question 1, the plaintiff concedes that the role of the court in assessing damage is to act strictly in accordance with the terms of the liability judgment. Issues of liability are regarded as having been determined and should not be revisited at the hearing of the assessment of damages. The court cannot disregard the liability judgment and the assessment of damages is not an occasion for the assessing court to set it aside or vary it in any way.

[34] In this regard, the Court of Appeal did not act contrary to the liability judgment. The basis of the defendant's loss was premised on cl 4.7 of the JVA. The issue thus hinges on the construction to be accorded to cl 4.7 of the JVA. Essentially, what it means is that the plaintiff shall refund the pre development operational costs (which includes the deposit and the squatters compensation), all monies paid to the plaintiff or any other parties and all costs and expenses which have been made legitimately and properly in relation to the development *within the scope of cl 4.7.*

[35] The defendant must first show that it had in fact proven its loss according to accepted principles of law. It is only then the question of whether loss was claimable arises.

[36] The Court of Appeal did not err in fact or law in considering whether the High Court erred in the manner it had approached the question of proof of loss. This is a matter of settled principle of law and as apparent from the decision of the Court of Appeal, its approach could never be described as being controversial or contrary to the liability judgment. As such, the plaintiff urged this court to decline to answer question 1.

[37] As for questions 2–6, it was submitted that they are non-starters. It is a cardinal principle of law that first and foremost, the defendant, who is the claimant in this case, must prove its loss. Whether the Court of Appeal misapplied the principle of 'no party should benefit from its own breach' is a secondary issue.

[38] As the Court of Appeal found that the defendant failed to prove its loss and expenses, it is therefore futile to even address questions 2–6. They are academic.

[39] The defendant contends that the non-fulfillment of conditions precedent cannot be equated to 'taking advantage of its own wrong'. The defendant further contends that there were no findings that the structures on the land were illegal and that the issue of illegality does not come into play because the learned High Court judge had already taken into account the failure to obtain the approvals were merely a breach of condition precedent of the JVA. In this regard, the plaintiff argued that there was no contention by the plaintiff on any illegality issue but what was an issue is whether costs and expenses by the defendant in relation to the development were properly and legitimately incurred for them to come within the monies to be refunded by the plaintiff under cl 4.7 of the JVA. As the defendant had commenced activities on the land without obtaining the necessary approvals from the relevant authorities, the defendant had acted against its undertakings as provided in the JVA, ie it had breached the provisions of the JVA, namely cl 4.1.2 and 4.1.4. Therefore, it must follow, that part of the expenditure being claimed was not legitimately or properly incurred for the purposes of the JVA. It was in that context that the Court of Appeal held that the defendant was seeking to take advantage of its own breach.

[40] On question 6, the defendant was relying on *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 at the Court of Appeal and not *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141. The Court of Appeal held that the reliance by the defendant on *Dream Property Sdn Bhd* was misconceived as the plaintiff in this case did not derive any benefit or advantage from the breach, as can be seen from the facts in *Dream Property Sdn Bhd*.

[41] In any event, the defendant was unable to provide credible evidence to support its claim that it had expended the amount over the development on the said land. It failed to adduce the source of the defendant's funds which purportedly enabled the defendant to pay out the large amount of cash payments.

[42] It is settled law that the standard of proof to be placed on cash transactions when assessing damages is similar as in all civil cases, ie, on a balance of probabilities.

[43] Finally, the defendant submits that the appeal should be dismissed and this court should decline to answer the questions posed as they failed to meet the threshold of s 96 of the Courts of Judicature Act 1964.

OUR DECISION

First question

[44] The defendant's purported loss is premised on cl 4.7 of the JVA. Therefore, it is pertinent to appreciate the context in which the order of the liability judgment which ordered the costs and expenses of the defendant to be assessed. For this, we reproduced the relevant part of the liability judgment of Rosnaini Saub J which reads:

> [25] As I have alluded to, the plaintiff has opted to exercise the right to rescind the JV Agreement by issuing the notice exh P10. Clause 4.7 provides in such an event, the plaintiff shall 'refund the Pre-development Operational Costs (which includes Deposit and the Squatters Compensation), all other monies paid to YS or any other parties and all costs and expenses which have been made by ADC in relation to the development'. In other words, the plaintiff cannot just rescind the JV agreement without having to refund and pay the defendant monies referred to in the said clause. This is the option and the stand taken by the plaintiff when it issued the said letter exh P10.
>
> ...
>
> [28] It is therefore my finding that the plaintiff's rescission of the JV agreement is valid and was in accordance with cl 4.7 of the JV agreement. What follows is that *the plaintiff is required to refund to the defendant the monies that it is entitled to under the said clause*. (Emphasis included.)

It is in the above context that the learned judge ordered as follows:

> That the plaintiff refund to the defendant a sum of RM50,503.00 being the deposit and squatters compensation, and *the assessment of the other sums to be repaid by the plaintiff to the defendant pursuant to cl 4.7* to be determined and assessed by the Registrar *in accordance with the said clause.* (Emphasis included.)

[45] The scope of cl 4.7 has to be understood. In addition, in construing what are the losses that is claimable, one cannot merely look at cl 4.7 in isolation. All relevant clauses in the JVA had to be considered. Regard must also be given to the surrounding circumstances which might legitimately be taken into consideration. There are other provisions of the JVA which the court ought to take into account when making the assessment under cl 4.7. This simply means that, the defendant must established that the loss claimed by them was the loss that falls *within the scope of cl 4.7* of the same.

[46] The pre-development operational costs (which includes the deposit and the squatters compensation), all other monies paid to the defendant or any other parties and all costs and expenses are the costs and expenses which have been made by the defendant in relation to the development. The 'Development Costs' is defined under cl 1.1 as '... the development costs incurred or to be incurred by ADC from time to time for the Development as provided in Clause 7 herein'. Clause 7 provides:

> 7. DEVELOPMENT COSTS

A 7.1 Subject to clause 21 hereof, the Parties hereby agree that ADC shall be solely responsible and liable for all Development Costs incurred or to be incurred for the Development up to and including sub-division of the document of title to the Said land into individual issue documents of titles and strata titles for the development and registration of the respective separate issue documents of titles and strata title in
B in favour of purchasers and third parties entitled thereto.

7.2 In this respect, the Parties hereto mutually agree that the Development Costs shall include, but not limited to, the following:-

7.2.2 conversion premium payable to the Appropriate Authorities for conversion of
C the category of use of the Said Land to medium industry or such other category as the parties may mutually agree including such other fees and charges as may be imposed by the Appropriate Authorities pursuant to such conversion;

7.2.3 all outgoings payable to the Appropriate Authorities and/or any other persons for the carrying out of the Development;

D 7.2.4 building plan fees, surveying fees and all other related expenses requested by the Appropriate Authorities;

7.2.5 insurance premiums, workmen's compensation fund, SOCSO (where applicable) and public liability insurance;

E 7.2.6 administrative costs, construction, building and infrastructure costs;

7.2.7 all premium in relation to the sub-division of the Said Land and other related costs;

7.2.8 consultancy fees, legal fees, stamp duties, taxes (excluding any tax payable by
F the Parties for their entitlement to profit), levies, fines, penalties or claims payable in relation to the Development;

7.2.9 advertisement, administration, sales and marketing costs, financial and management costs, promotion, discount or debit notes;

G 7.2.10 costs of financing;

7.2.11 payments of late delivery claims; and

7.2.12 all other related expenses incurred or to be incurred for the construction and completion of the development.

H

[47] The development costs under cl 7 must be appreciated in the wider context of the JVA and the court must give effect to the other parts of the JVA (*Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357). A reading of the other clauses of the JVA, shows that the following clauses has a bearing
I on cl 7:

(a) cl 10.1 which provides that '... ADC shall apply for and obtain all requisite consents from time to time as may be appropriate for the development beginning from the date of this Agreement up until the expiry of the Development Period';

(b) cl 4.1.2 and 4.1.4 which provide:

> 4.1.2 Approved Plans for the Aviation Services
>
> ADC shall prepare and submit for the approval of the Appropriate Authorities of the layout plans and building plans for the Aviation Services.
>
> 4.1.4 Other Approvals
>
> ADC shall prepare and submit for other requisite approvals ('Other Approvals') from relevant authorities as are required for the execution of this Agreement and the implementation of the Aviation Services and carrying out the matters contained herein;

(c) the defendant covenanted with the plaintiff under cll 6.3.1 and 6.3.2 which read as follows:

> 6.3 Obligations of ADC
>
> ADC hereby undertakes and covenants with YS that in carrying out the Development ADC shall:-
>
> ...
>
> 6.3.1 observe and comply with all relevant laws, regulations, statutes and by-laws for the time being in force affecting the Development or construction to be carried out on the said Land; and
>
> 6.3.2 ensure that all statutory orders and regulations made under or deriving validity from any requirements and codes of practices of the Appropriate Authority affecting the Development or the Said Land are complied with.
>
> ...
>
> 6.4. In addition and not in derogation of those provisions set out in Clause 6.2 above, ADC shall use its best endeavours to procure that:
>
> ...
>
> 6.4.3 the Approved Plans for each different types of development (and any variation thereto) and the requisite consents under the Development are complied with;'
>
> 6.4.4 All statutory orders and regulations made under or deriving validity from and any requirements and codes of practices of the Appropriate Authorities affecting the Development and/or the Said land are complied with;

[48] Therefore, premised on the contractual framework of the JVA which was entered into by the parties, with particular reference to the clauses we have referred to, it must follow that whatever defendant's entitlement to any development costs must be the costs which were legitimately and properly incurred for the purposes of the JVA. The costs and expenses incurred by the

A defendant in relation to development as envisaged by cl 4.7 must mean the development costs which are particularised in cl 7.

[49] The learned High Court judge in the liability proceedings made findings that the defendant failed to comply with cll 4.1.2 and 4.1.4 of the JVA, B namely, failed to obtain approvals for the lay-out and building plans from the relevant authorities for the purposes of executing the JVA. This is in contravention to the expressed undertakings by the parties as contained in the terms in the JVA, namely cll 4.1.2, 4.1.4, 6.3.1, 6.3.2 and 6.4.3 and 6.4.4.

C

[50] In our view, the Court of Appeal did not err when it made the findings that part of the expenditure being claimed was not legitimately or properly incurred for the purposes of the JVA. This is where the Court of Appeal further made the statement that it appears that the defendant was seeking to take D advantage of its own breach when it concluded that the defendant 'is not entitled to compensation from the plaintiff under cl 4.7 of the JVA as they had knowingly carried out work not in accordance with the JVA and they cannot therefore benefit from their breach'.

E **[51]** Therefore, based on the aforesaid, we disagree with the submission of the defendant that by making such findings the Court of Appeal was revisiting the liability issue when the High Court had already ordered for the assessment to be executed after making finding of liability and ordered that the plaintiff to refund whatever monies that has been paid by the defendant for the F development of the land. With due respect to the defendant, that interpretation failed to take into account the scope of cl 4.7 by reference to the JVA as a whole.

[52] Question 1 presupposes that the Court of Appeal acted in a manner G which is contrary to the liability judgment, which we view as being misconceived. There was no misdirection by the Court of Appeal and neither did it misapprehended the legal principles applicable to assessment of damages and appellate intervention. The liability judgment directed an 'assessment of the other sums to be repaid by the plaintiff to the defendant *pursuant to Clause* H *4.7* be determined and assessed by the Registrar *in accordance with the said clause*'. To determine the losses incurred by the defendant within the scope of cl 4.7 is definitely not revisiting the liability issue. The question is premised on an erroneous presumption that the Court of Appeal was acting contrary to the liability judgment. There is no nexus between the question framed to the I factual matrix of the case and therefore does not warrant our consideration.

[53] In any event, we are of the view that question 1 is not novel and does not involve a question of law of general principle not previously decided for the first time by the Federal Court (the first limb of s 96(a) of the Courts of Judicature

Act 1964). It is trite principle of law that a court must assess damages according to the direction by the court to assess except that in our case, it is confined to costs and expenses which are legitimately and properly incurred for the purposes of the development pursuant to the JVA as envisaged under cl 4.7. The question framed therefore does not reflect the facts of our present case. The context of the liability judgment is facts sensitive. Hence, we decline to answer question 1.

Questions 2–6

[54] The defendant contends that the Court of Appeal erred in law as it failed to appreciate the scope and had misapplied the principle of 'no party should benefit from its own breach'.

[55] We agree with the submission by the plaintiff that those questions from questions 2–6 are non-starters because what is important is for the defendant to prove its loss. It is settled principle of law that when one brings an action before the court for damages, one must prove it. However, before one can recover the damages, one has to discharge the burden of proving both as to the fact of the loss/damage and as to the amount, see:

(a) *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99; and

(b) *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177.

Failure to prove either one means the claim fails (*Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635).

[56] In the present appeal, the Court of Appeal found that the defendant failed to prove that it had incurred the development costs. The Court of Appeal had impugned the decision of the High Court when it held that from the evidence adduced the real development was the 678 meters of airstrip which was constructed without the relevant approvals from the relevant authorities. The rest of the structures appeared to be a simple non-permanent structure which does not justify the total claim of RM20,840,141.

[57] The Court of Appeal was concerned on the issue of substantial payments purportedly made in cash to the amount of RM14,050,000 from 9 October 2007 to 13 February 2009. It held that the High Court was plainly wrong when it failed to take into account all the relevant evidence which throws serious doubt on whether the alleged cash payment were indeed made by the defendant. The High Court had made findings on the loss without any basis or justification when a claim in excess of RM24m was made for the costs and expenses incurred when the land value after improvement was only RM7,350,000, according to the registered valuer. There was no justification

given by the High Court when it failed to give credence to the testimony of the registered valuer, PW1, who gave expert opinion that the current market value of the said land after development was RM7,350,000 which included an improvement to the said land. PW1 gave evidence that the value of the improvement to the said land was only RM70,000.

[58] The Court of Appeal conceded that there is nothing wrong in making payments in cash, however, in this case, serious questions should have been asked when the total payment in cash was purportedly more than RM17m but unsupported by credible evidence (paras 55–56 of the judgment of the Court of Appeal). As a result, the Court of Appeal concluded that:

> [57] ... the High Court did not properly appreciate how the respondent could come up with this money in the first place before it could pay others. No bank accounts were shown and no statement of accounts were produced to show where the money came from. When there was a strong challenge that no cash payments were made and the assertions of payments were fictitious, it was incumbent upon the respondent to clearly established the source of funds. The respondent chose not to do so. We are therefore, compelled to conclude that they could not do so because no such funds were provided.

[59] Ultimately, the Court of Appeal held that 'in the premises the High Court was plainly wrong not to have appreciated the whole of the evidence and had come to the unfortunate conclusion that loss was proved'. We had scrutinised the evidence on the records and we agreed with the conclusions reached by the Court of Appeal.

[60] Hence, as the defendant failed to prove the development costs and whatever expenses that it had incurred, the issue as to the applicability of the maxim 'no party should benefit from its own breach' does not arise.

[61] In any event, the rule 'no party should benefit from its own breach' *is not the basis of the decision of the Court of Appeal* in allowing the appeal. The Court of Appeal merely stated in passing at para 27 of its judgment that 'In claiming for those monies, it appears to us that the respondent was seeking to take advantage of its own breach'. The fact shows defendant was carrying activities on the land without approval. The Court of Appeal had approached the assessment in accordance with the liability judgment and, pursuant to such purpose, had considered the scope of cl 4.7 of the JVA (refer to paras 25–27 of the Court of Appeal judgment) in determining the losses. The way question 2 was framed does not reflect the judgment of the courts below. We therefore, decline to answer question 2.

Question 3

[62] For question 3, the defendant contends that the rule that 'no party should benefit from its own breach' is inapplicable when both parties have been held to be equally blameworthy. This issue was never argued nor raised before the High Court nor the Court of Appeal. In any event, nothing turns on this issue.

Question 4

[63] This question presupposes that there is an express provision in the JVA or an agreement between the parties to exclude or modify 'the no party should benefit from its own breach'. Similarly this issue was never raised nor argued in the courts below.

Question 5

[64] This question assumes that the plaintiff was aware of the breach and had acquiesced to the same. This issue was never raised nor argued before the courts below. It is not for this court to make a finding on the determination of the facts at this stage.

Question 6

[65] Given that there is a finding by the Court of Appeal that the defendant failed to prove its loss, this question is academic and answering it would not have any effect on the outcome of the appeal.

[66] The principles as enunciated in *Patel v Mirza* [2016] UKSC 42 which was adopted by the Federal Court in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141 and *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 318 are inapplicable in the context in which the issue of 'Illegality' arose in our case. In any event, the case of *Patel v Mirza* was not cited neither was the principle enunciated therein, argued in the courts below. Instead, the defendant sought to rely on *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 to assert that the plaintiff has gained an advantage by having the development on the said land. However, the Court of Appeal rejected such assertion and held that the plaintiff in our case has not derived any benefit nor advantage as can be found from the facts in *Dream Property Sdn Bhd*. We do not find any error that justifies our intervention.

[67] In our present case, the issue depends on the construction of cl 4.7 of the JVA which provides what the defendant was entitled to recover from the plaintiff. Clause 4.7 is not a stand alone provision as we have elaborated in the preceding paragraphs. It is never the case of the plaintiff that the claim by the defendant was based on an illegal contract, as can be found in *Patel v Mirza*, where the agreement was tainted with illegality from the beginning. In the present case, the JVA is a valid agreement and remains binding on both parties prior to the termination. The contraventions of law in our case was unlike the contraventions in *Liputan Simfoni* and *Tan Keen Keong @ Tan Kean Keong*.

[68] The issue in *Liputan Simfoni* was, inter alia, whether a sales and purchase agreement was void ab initio, given the findings of the high court that agreement allowed for the evasion of real property gains tax and for the payment of the stamp duty. The Federal Court after referring to *Patel v Mirza* and other cases held that:

> [125] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of the learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. The compliance with the Stamp Act 1949 and the Real Property Gains Tax Act 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provisions. In addition, it is provided that tax due and payable may be recovered by the Government by civil proceeding as a debt to the Government. The object of the two Acts is to raise revenue. There is therefore no sufficient nexus such would satisfy the test laid down in Curragh Investment Ltd. The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.
>
> [126] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by the fine upon conviction.

[69] *Tan Keen Keong @ Tan Kean Keong* addressed the issue of whether the companies could be wound up on just and equitable grounds premised on the court's findings that there were contraventions of the Companies Act 1965, the Penal Code and the Income Tax Act 1967. It was in such context that the Federal Court said:

> [51] ... it must not be forgotten that it is a matter of good policy and proper administration that a clear divide exists between the law of crimes and the law of civil penalties and remedies; the applicable burden and the standard of proof are

> obviously different let alone the right to prefer a charge for the various offences identified by the court in these appeals... This court noted the view expressed by Lord Toulson in *Patel v Mirza* ... where His Lordship cited Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* [1956] 3 All ER 683 when warning 'of the danger of overkill and whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression' ...
>
> [52] We can only re-emphasise this point. The civil courts when determining private disputes including petitions to wind-up a company by one of its shareholders ought not to conflate any supposed wrong-doings of its directors with those of the company itself giving rise to potential issues of double jeopardy if the civil courts were to impose penalty or mete out orders addressing the wrong-doings; more so when one examine the terms of s 218 itself ...

[70] Coming back to our present case. There was never any instance that the JVA was void ab initio for being illegal and neither was it declared as such. It is also not a situation where the Court of Appeal determined the issues before it on the basis that the defendant was seeking to make a claim premised on an illegal agreement. The issue of illegality does not arise at all at the courts below. It was a breach of condition precedent of the JVA on the part of the defendant when it failed to obtain approvals from the relevant authorities for the lay out plans and commencing commercial activities. Hence, the application of the illegality principle as enumerated in the cases cited to our present facts is clearly misplaced.

[71] Question 6 in essence seeks this court to determine on legal issues which has no link to the facts of the case. The legal issues are not issues of law that arose in the course of the hearing and arguments before the courts below. Therefore, the premise of the question on the facts of the case is misconceived.

[72] We, therefore, decline to answer question 6.

Question 7

[73] The defendant contends that the Court of Appeal placed undue emphasis on the fact that cash payments for large sums have been made and failed to give due consideration to the evidence placed before the court and had in the course of making its decision had placed a higher burden of proof on the defendant. Reliance was placed on *Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals* [2017] 3 MLJ 728 and the Currency Act 2020 (specifically to s 21 thereof).

[74] We find that this contention by the defendant is misconceived. The Court of Appeal emphasised in its judgment that 'there is nothing wrong in making payments in cash'. It qualified such statement with specific reference to the present case that serious questions should have been asked when the total

paid in cash was purportedly RM17m and the lack of evidence as to the defendant's source of monies and the ability of the defendant to pay such amounts was highly incredible (refer to paras 57–58 of the Court of Appeal judgment). The source of monies and the ability of the defendant to make the purported cash payments were challenged by the plaintiff from the outset. DW1, the defendant's director was unable to provide any credible explanation or evidence on how the defendant was able to make cash payments in the sum of millions and the lack of documentary evidence to substantiate its source of monies.

[75] In this regard, we have carefully considered the submissions advanced by the plaintiff and there is force in the same. We may summarised the submissions as follows:

(a) the defendant's purported source of funds was vague. From the evidence of DW4, the defendant was given 'friendly loans' and those monies were 'not necessarily' placed in the defendant's bank accounts. It was said that the whole project was not financed by any financial institution like a local bank. It is all friendly loans and many of its funds that the defendant received was because of the defendant's personal standings with the people who have lend them the money. DW4 said that it was all done on the strength of his standing as an individual when he was cross examined and asked whether he had 'any documents or any resolutions or any evidence to show that these people actually gave money to the company'. DW4 said that the cash payments were reflected in the accounts of the defendant but he admitted that the audited accounts were not before the High Court. He said that not all payments were reflected in the audited accounts as 'a lot of these payments are also personal and private loans' given to him as he was the one financing it. However, he was unable to provide a specific figure on his own contribution to the defendant;

(b) with specific reference to the payment made to Aziebina Sdn Bhd which was the largest sum, DW4 admitted that the letter of award for Aziebina Sdn Bhd was not before the High Court and he was unable to provide details on the terms and conditions of its appointment. DW4 was evasive on the records of the payments made by the defendant to Aziebina Sdn Bhd and his answer was that 'a lot of the things were done because they had friendly arrangements with their suppliers'. He admitted that he had no records at all of the defendant's expenditure. He was of the view that the other documents were not produced because he was of the view that the payment vouchers were sufficient for purposes of assessment of the defendant's loss;

(c) the deficiency of the evidence in support by the defendant for the recovery of the loss is very glaring given the following:

(i) there is no evidence of actual payment by the defendant. No bank statements to show the withdrawal of monies and neither were the audited accounts produced by the defendant;

(ii) there is no record of the actual work or services rendered by the third parties, especially Aziebina Sdn Bhd which constitute the largest purported cash payment made by the defendant. Aziebina Sdn Bhd allegedly built the runway or MSH Architect which purportedly engaged and paid other third parties for professional services;

(iii) there were no receipts nor invoices issued by the third parties apart from the evidence by the witnesses to confirm that payments were made;

(iv) DW1 admitted that he did not issue invoices or receipts as he claimed he was not a 'company'. In addition, he only issued payment vouchers which were not prepared contemporaneously but few months later;

(v) DW2 admitted that the Inland Revenue Board was not aware of all the cash payments from the defendant as nothing was recorded;

(vi) DW3 was not a qualified registered architect at the material time and was unable to provide any evidence of work done on the project;

(vii) DW5 did not have personal knowledge on the sums that were purportedly due and owing to Aziebina Sdn Bhd or whether the services were rendered; and

(viii) the defendant has not particularised its losses despite saying that works were done. Reference to the counterclaim at encl 19 para 7 in the defence and counter claim of the defendant did not state what are the particulars of losses.

[76] Premised on the inadequacy of evidence to substantiate the defendant's alleged loss which was further heightened by the lack of documentary evidence and the uncorroborated testimony of the defendant's other witnesses, the Court of Appeal has rightly concluded that the High Court was plainly wrong in evaluating the evidence before it when it failed to judicially appreciate the same. There is no higher standard of proof imposed on the defendant in proving its losses.

[77] The reliance by the defendant on the case of *Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals* [2017] 3 MLJ 728 is also misplaced as the facts therein is easily distinguishable from the facts in ours. There, although the payment was made in cash, it was adequately explained and justified as can be

discerned from the judgment in the said case at paras 49–51 of the grounds of judgment:

> [49] From the record, it was also the trial court itself that had misapprehended the cash payments to be necessarily in physical notes, and that this did not sound plausible as 'additional steps that would have to be taken to assure the safety and security of a large amount of cash'. With respect to the learned JC, there was not only undue emphasis on the mode of the cash payment but also no basis for rejecting the oral testimonies of the appellants that they had fully paid the purchase price in cash. There was no suggestion that the appellants were persons who were not capable of financing such purchases and the appellants have in any event testified in detail as to how the total sums were raised.
>
> [50] The non production of bank statements or any records was also adequately explained-'hal ini sudah lama dan saya tidak simpan statement-statement tersebut'; and the appellants were each relying on the Lee letters. It is not appropriate to evaluate the testimonies and evidence presented with the benefit of hindsight; the evidence must be tested for their veracity as at the relevant time, pitched against certain critical facts. The purchases were made in 2006 with the appellants almost immediately been given possession and occupation. The appellants occupied and appear to continue occupying the properties until the matter of title was taken to court. At no time were any of the appellants evicted by virtue of the position taken by the respondent; that there was no sales. If indeed that was the position, there is no explanation forthcoming as to why the respondent never evicted any of the appellants. Instead, the respondent only acted when the appellants sued; and the matter of vacant possession was taken as a counterclaim.
>
> [51] What was critically not evaluated by the learned JC is the common reason behind the payment in cash. Lee was giving a 10 % discount on the properties provided that the purchase price was paid in cash. The fact and the existence of discounts are not in dispute. These were not situations where payments in cash were made for no rhyme or reason; the appellants paid in cash so that they could each purchase the property on a discounted price ...

[78] The defendant also relies on the Currency Act 2020 which came into force in October 2020 after the decision of the Court of Appeal. It was never referred in the courts below. In any event the legislation is not relevant to the matters herein and neither does it lend support to the defendant's case. There is no limit on the use of large amount of cash transactions. The Currency Act 2020 was introduced to eventually introduce a cash limit to address money laundering activities and the exploitation of cash transactions which is difficult to trace in criminal activities.

[79] Thus the answer to the question posed by question 7 is on a balance of probability. In any event answering the question would not change the outcome of the appeal by the defendant.

CONCLUSION

[80] Therefore, our decision is as follows.

Question 1

It is settled law that a court must assess damages according to the direction of the liability judgment. This is trite principle of law and neither is it a novel issue decided for the first time. In addition the question posed does not reflect the facts in our present case. The Court of Appeal did not act contrary to the liability judgment. We therefore decline to answer the question.

Questions 2–6

We decline to answer questions 2–6 because the rule of 'a party should not benefit from its breach' is secondary to the issue that the defendant failed to prove its loss. The principle of 'a party should not benefit from its breach' raised in questions 2–6 were never raised nor argued in the High Court and the Court of Appeal. In any event, the principle of 'a party should not benefit from its breach' was not the basis of the decision of the Court of Appeal when allowing the appeal of the plaintiff. Again, we decline to answer questions 2–6.

Question 7

The standard of proof has always been on a balance of probability. However the reliance by the defendant on *Lee Chee Keong* is misplaced as the facts in our case and *Lee Chee Keong* are poles apart.

The Currency Act 2020 is not applicable to the issues in our case.

In any event, the answer to question 7 would not have any bearing on this appeal.

[81] We therefore dismiss the appeal by the defendant with agreed costs of RM50,000 subject to allocator. We affirm the decision of the Court of Appeal.

Appeal dismissed with agreed costs of RM50,000 subject to allocator; COA's decision affirmed.

Reported by Dzulqarnain Ab Fatar